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No. 99-2062

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 2000

CLIFFORD ALEXANDER, ET AL.,

Appellants,

V.

NORMAN Y. MINETA, ET AL.,

Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' OPPOSITION TO THE MOTIONS TO AFFIRM

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Appellants oppose the motions of the federal Government and the House Officers to affirm summarily the decision of the two-judge majority below.

A. The Question Presented is Important and Substantial.

The federal Government and the House Officers do not deny that the question presented here is substantial. Nor could they. This Court has made clear that questions involving the circumstances in which American citizens may be deprived of the right to vote are fundamental under our Constitution. As the *amicus* brief for the League of Women Voters demonstrates, this Court has repeatedly accepted for plenary review those questions involving the dilution of a citizen's right to vote. Here, the question presented involves not just the dilution of that right, but its complete denial.

The principles of constitutional interpretation to which the Government adheres in its motion to affirm cannot be reconciled with its own history or this Court's precedents. In prior suits seeking to vindicate the people's right to representation in the House of Representatives, the federal Government has not hesitated to acknowledge the centrality of the right asserted:

> The right to vote is "one of the fundamental personal liberties protected by the Constitution."[1]

Nor has the federal Government, in earlier cases involving actions restricting the franchise, equated historical practice with what is constitutionally permissible:

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[1] Brief of the United States as Amicus Curiae, at 4, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *see Harper*, 383 U.S. at 670.

> "[W]hen this most fundamental right is involved—whatever 'the conception * * * of a bygone day'—it is surely axiomatic in our present democracy that no classification is reasonable which makes arbitrary distinctions with respect to the franchise."[2]

Finally, the federal Government has not previously shied away from perceived limitations in the constitutional text to give the right to vote its full effect:

> "The Constitution and its history demonstrate convincingly that the House of Representatives was intended to represent the people directly and that Congressional districting within each State, like the apportionment between the States, was to be on this same basis. Conceivably, this was merely the framer's intention rather than a binding requirement of the Constitution. However, the adoption of the Fourteenth Amendment—with its guarantee 'of the equal protection of the laws'—strongly indicates that Congressional districting must be based on population. . . . [T]he original framers made clear that equal protection, and indeed the basic fairness required by the due process clause, so required as to the federal House of Representatives."[3]

Sadly, in its motion to affirm summarily the decision of the two-judge majority below—a motion that does not even address the arguments raised by the dissenting judge—the

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[2] Brief of the United States, at 60, *Louisiana v. United States*, 380 U.S. 145 (1965); *see Louisiana*, 380 U.S. at 153.

[3] Brief of the United States at 35, *Wesberry v. Sanders*, 376 U.S. 1 (1964); *see Wesberry*, 376 U.S. at 7-18.

federal Government departs from these principles of interpretation and urges the "most literal reading" of Article I, § 2, without any acknowledgement of the resulting injustice to half a million Americans living in the District of Columbia.

B. The Question Presented is Not Appropriate for Summary Disposition.

The Government contends that the reference in Article I, § 2, to election by "the People of the several States" must be given its "most literal reading" as conferring a right to vote only on citizens who live in States, and not on those who live in the area that was part of the several States at the time the Constitution was adopted but then by cession became the nation's capital. U.S. Br. at 11. Any other interpretation, the Government argues, would "lead to insurmountable textual difficulties and conflict with both historical evidence and judicial precedent." *Id.* That is not so.[4]

First, the "uniform body of judicial precedent" that the Government claims in its support amounts, at best, to a few sentences of dicta. *See* App. 78a n.3, 119a-120a (Oberdorfer, J., dissenting). Other than the court below, no court, much less this one, has ever directly considered the question presented here: whether U.S. citizens living in the nation's capital and otherwise eligible to vote must be denied that right simply by virtue of their place of residence. No court has ever considered whether the Maryland citizens in that part of the State ceded to the federal Government could by cession constitutionally have been deprived of their right to representation, a right they had exercised for twelve years. Nor has any court ever considered the interaction between Article I, § 2, and the twentieth-century recognition of the

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[4] Because of the constraints of addressing these contentions summarily, we respectfully refer the Court to Judge Oberdorfer's dissent (App. 75a-145a) for a more complete elucidation.

depth of the equal protection and due process guarantees of the Fifth and Fourteenth Amendments for all Americans.

Additionally, the precedent is not nearly as uniform as the Government asserts. "Whether the District of Columbia constitutes a 'State' . . . within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Where individual rights are concerned, the Court has not hesitated to hold that the people of the District should be treated as the people of a State, even with respect to those constitutional provisions that, on their face, appear to be limited to "States." *See National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949) (right to access federal court diversity jurisdiction); *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933) (right to have cases arising under the Constitution heard by an Article III court); *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (right to full faith and credit of out-of-state judgments); *Callan v. Wilson*, 127 U.S. 540, 548-50 (1888) (right to trial by jury).

The Court's recognition that individuals in the nation's capital must enjoy the same constitutional rights as individuals who live in the fifty States is supported by the fact that the District was once part of the several States that formed and ratified the Constitution. App. 94a-103a (Oberdorfer, J., dissenting). As this Court explained in the *O'Donoghue* case:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, ... We think it is not reasonable to assume that the cession stripped them of these rights[.] 289 U.S. at 540.

This history, and the history of the Constitution's ratification, soundly support appellants' claims that they are constitutionally entitled to representation in the U.S. House of Representatives. As Judge Oberdorfer points out, the Seat of Government clause in Article I, § 8, that the Government claims deprives District citizens of the right to congressional representation was discussed and adopted at the Constitutional Convention *without any recorded debate* as to its implications for the voting, representation or any other rights of the inhabitants of the territory that would ultimately be selected as the nation's capital. App. 85a, 112a.

The "historical evidence" that the Government points to in support of its argument that the Framers intended to disenfranchise District residents occurred not at the Philadelphia convention where the Constitution was drafted, but at one of the thirteen ratifying conventions that took place a year later. The Government cites a single comment made at the New York convention by Thomas Tredwell, who opposed the Constitution in its entirety, as well as a proposal by Alexander Hamilton to add an amendment to provide for "District representation" in the Congress once its population reached an unspecified number. U.S. Br. at 14-15. Judge Oberdorfer persuasively explains why neither of these isolated statements, at a single ratifying convention, can be considered evidence of an intent on the part of the framers to disenfranchise citizens residing in the nation's capital. App. 114a-118a.

Judge Oberdorfer's dissent also explains why the view of a handful of individual congressmen expressed at the time of the enactment of the Organic Act in 1801, in which Congress exercised jurisdiction over the District as the Seat of Government, is also not reliable "historical evidence" as to the original intent behind Article I, § 2. App. 118a-119a ("Had populous New York or Philadelphia been chosen as the permanent Seat of Government, however,—certainly a possibility in 1787—it seems unlikely that 1801 Congressmen would have seen the denial of voting representation for the

District's population as the Framers' manifest design.") (citation omitted).

Moreover, the voting history of District residents up until enactment of the Organic Act in 1801 is far from irrelevant, as the Government apparently believes. U.S. Br. at 17. Although it may not provide insight as to Article I's original meaning, it is indisputable evidence that the people of the nation's capital had, and exercised, a constitutional right to congressional representation for the twelve years from 1789 to 1801. Neither the cession instrument nor the Organic Act purported to take away that right and, as Judge Oberdorfer cogently argues, they could not constitutionally do so. *See* App. 97a-103a; *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736 (1964) (constitutional voting rights of minority not waivable by majority); *O'Donoghue, supra* (constitutional rights not lost at cession).

The "textual difficulties" in construing Article I, § 2, to recognize congressional representation for the U.S. citizens resident in the nation's capital are hardly "insurmountable," as the Government contends. For example, it observes that Article I, § 2, made an initial apportionment of seats in Congress among the original thirteen States based on their population at that time and that no seats were allocated to the capital district. U.S. Br. at 12-13. This is not surprising given that the site for the District had not yet been chosen when the Constitution was drafted, and no one knew what its population would be.

The Government is similarly troubled by the reference in Article I, § 2, to apportionment among "the several States *which may be included within this Union*," contending that the "Union does not include the District, which has never been admitted by Congress to the Union as a State." U.S. Br. at 12. This "textual difficulty" has already been resolved by the *O'Donoghue* case, when the Court held that "the District was made up of portions of two of the original states of the Union, and *was not taken out of the Union* by the cession." 289 U.S. at 540 (emphasis added).

The Government also notes that Article I, § 2, provides that the qualifications for voting in Congressional elections shall be the same as for voting for "the most numerous Branch of the State Legislature," and it asserts that the District has no such body. U.S. Br. at 11. However, if it were accepted that the District should be treated as a "State" for purposes of apportioning representatives to the "People of the several States" under Article I, there is no reason why the Council of the District of Columbia (or Congress itself) could not serve as the District's "State Legislature" within the meaning of that provision. Likewise, if the Court were to find that for this purpose District residents retained a residual citizenship in Maryland, that State's qualifications for voting in Congressional elections could be applied. Certainly, this "textual difficulty" is no more insurmountable than it is with respect to overseas voters who, despite the language of Article I, are permitted to vote in federal elections even though state law may not recognize them as having the qualifications to participate in state elections by virtue of their foreign residence. *See* App. 139a (Oberdorfer, J., dissenting).

The Government further argues that "the text and purposes of the Twenty-third Amendment confirm the correctness of the district court's analysis." U.S. Br. at 13. However, the amendment states only that the District shall be treated as "if it were a State" for purposes of Presidential elections. The amendment plainly does not say that the District shall not be treated as if it were a State for any other purpose; nor does it purport to change the Constitution's treatment of the District for any purpose other than Presidential elections.[5]

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[5] The Government's argument that what the twenty-third amendment did not expressly confer on District residents is implicitly denied is precisely the type of negative inference that this Court has refused to make in voting rights cases. *See, e.g.*, Harper, 383 U.S. at 666, 680 (striking down use of poll taxes in state (continued...)

Finally, the Government cannot simply brush off appellants' equal protection argument on the ground that the difference in treatment between residents of States and residents of the nation's capital is "drawn by the Constitution itself." U.S. Br. at 24 (citation omitted). As the federal Government itself has advocated in previous submissions to this Court, *see supra* note 3, the equal protection guarantee amends and informs the original Constitution, not the other way around. The government's current position that the equal protection clause is limited by what precedes it is inconsistent both with its own past position and this Court's precedents. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (fifth amendment due process guarantee must be interpreted to incorporate fourteenth amendment's promise of equal protection); *see also* App. 130a-144a (Oberforder, J., dissenting).

In sum, as even this cursory review illustrates, the textual, historical, and precedential arguments on both sides of the debate are nuanced and far from open-and-shut. The question whether United States citizens residing in the nation's capital can justly continue to be deprived of any voting representation in Congress is of the highest order and calls for plenary consideration by this Court.

C. Appellants Have Standing to Raise the Question.

As the three-judge district court unanimously determined, appellants have standing to pursue their claims. App. 8a-17a, 75a n. 1. In so holding, the court looked to this Court's decision in *Franklin v. Massachusetts*, 505 U.S. 788

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elections even though such a prohibition had been left out of the twenty-fourth amendment). Further, the ninth amendment forbids any inference that the Constitution's affirmative protection of certain rights implies that others are unprotected. U.S. Const. amend. IX.

(1992), in which a majority of the Court, in two opinions, necessarily concluded that the plaintiffs in that case had standing to pursue their apportionment claim against the Secretary of Commerce, the President, and the Clerk of the House. The court below held that appellants satisfied the redressability prong of the standing inquiry because "[h]ere, as in *Franklin*, neither the President nor the House officials have suggested that they would refuse to follow a decision of this court" directed to the Secretary of Commerce with respect to the apportionment of congressional districts. App. 14a.

Although the federal Government now agrees that, under *Franklin*, appellants have standing to press their case (U.S. Br. at 9 n.3), the House officers contend that the district court was obliged to determine separately, for each defendant, whether the court could grant injunctive relief that would redress appellants' injury. They rely for this proposition on the Court's decision in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-95 (1998), but all the Court held in that case was that a federal court may not exercise "hypothetical jurisdiction" by addressing the merits of a claim without first resolving jurisdictional objections. It did not overrule *Franklin* and require a plaintiff to establish standing separately against each and every defendant in apportionment challenges. Here, the district court acted fully consistent with *Citizens for a Better Environment* by first finding that appellants had standing under *Franklin* before proceeding to decide the merits of the case.

Even if the House Officers are correct that a separate standing determination was required, however, the requirements for standing clearly have been met. Appellants have an undeniable injury—the lack of voting representation in the House of Representatives—that is traceable in part to the actions of the House Officers, and can be redressed by them. The House Officers enforce the statutes, rules and determinations that prevent District citizens from being represented in the House of Representatives. Because the federal courts have the power to enjoin the House Officers to

abide by the Constitution in carrying out their duties in Congress, [6] this Court can redress those injuries by ordering the House officers to allow representatives of District citizens access to the House floor, to tally these representatives' votes, to include them on the Clerk's Roll, and to pay them appropriate salaries.

CONCLUSION

For the reasons given above and in appellants' Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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[6] *See Powell v. McCormack*, 395 U.S. 486 (1969) (sustaining challenge to House officers' exclusion of Representative from Congress); *see also Boehner* v. *Anderson*, 30 F.3d 156 (D.C. Cir. 1994); *Michel* v. *Anderson*, 14 F.3d 623, 625-26 (D.C. Cir. 1994); *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1983).